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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 240

JOHN BARCLAY, JR., Executor of the Estate of Rebecca Coulter Barclay, Deceased, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C. WARD EICHER,
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UNITED STATES OF AMERICA, Respondent.

PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Fred N. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

John Barclay, Jr., Executor of the Estate of Rebecca Coulter Barclay, Deceased, respectfully petitions for review of a judgment of the United States Court of Appeals for the Third Circuit entered April 27, 1949, on which re-hearing was denied June 20, 1949, affirming a judgment of the District Court of the United States for the Western District of Pennsylvania entered January 30, 1948.

Summary Statement of the Matter Involved.

(a) THE PROCEEDINGS BELOW.

The opinions of the District Court are officially reported as 73 F. Supp. 816 and 74 F. Supp. 938. The opinion of the Court of Appeals is not as yet officially reported. A certified copy thereof is included in the certified copy of the record filed herewith.

(b) THE FACTS OF THE CASE.

Review is sought of a judgment of the United States Court of Appeals for the Third Circuit affirming a judgment of the District Court of the United States for the Western District of Pennsylvania sustaining in part the action of the Commissioner of Internal Revenue of the United States in rejecting, to the extent of $26,858.99, a claim for refund of an alleged overpayment, in the total amount of $40,796.15, of the Federal estate tax of Rebecca Coulter Barclay (decedent). The District Court, allowing recovery as to $1,530.93 of the amount rejected by the Commissioner, sustained the Commissioner as to his rejection of the balance of $25,328.06.

This case arises under subsections (a) and (f) of Section 302 of the Revenue Act of 1926, as amended, 44 Stat. 9; 26 USCA Int. Rev. Acts, 1924 to 1940, pages 227, 230-1, which respectively provide that for Federal estate tax purposes a decedent's gross estate shall include the value of property to the extent of the decedent's interest therein at the time of his death and to the extent of any property *passing* under a general power of appointment exercised by the decedent by will.

Rebecca Coulter Barclay died in 1937, a widow and resident of Pennsylvania. In her will she directed payment of her debts, funeral expenses and probate expenses. She then made several specific bequests aggregating approximately $120,000. The next and last dispositive direction in her will was as follows: "All the rest, residue and remainder of my estate I will, devise and bequeath to my son, John Barclay." Decedent's individual estate, administered by her executor, exceeded the aggregate of her debts, administration expenses and specific legacies by more than $700,000. Decedent was survived by an only son, John Barclay, Jr., her sole heir at law.

At the time of her death decedent was one of five beneficiaries of a testamentary trust created by her mother, Emma W. Coulter (donor), at her death in 1929.

Under the donor's will the income of such testamentary trust was payable in equal shares to her five children and upon termination of the trust the principal was also distributable to them in equal shares. Each of her children was given general powers of appointment by will over each such child's share of the income and the principal of the trust and in default of appointment the income was payable and the principal distributable, upon termination of the trust, to the persons who would have been entitled to receive the same under the laws of Pennsylvania as though each such child had been legally seized and possessed of his or her share of the income and principal and had died intestate.

The donor's will further provided that the trust should terminate upon the death of the survivor of the trustees and, in any event, upon the expiration of twenty-

one years from the donor's death, but that the trust could be terminated before the end of such period of twenty-one years by the trustees. The trustees appointed were the decedent and her brother, Richard. The trust is still in existence.

Under Pennsylvania law the above-quoted residuary clause of decedent's will operated as an exercise of the general power of appointment over a one-fifth share of the principal of her mother's testamentary trust. As will later appear, an important issue in this case is whether such power was exercised in favor of decedent's son or in favor of her own estate.

On April 5, 1939, decedent's son filed a written renunciation in the proceedings in decedent's estate pending in the Orphans' Court of Westmoreland County, Pennsylvania, which after various recitals not here material, read: "Therefore, I, John Barclay, Jr., do hereby elect to take whatever interest I may have in the trust established under the Last Will and Testament of Emma W. Coulter by, through, under and by virtue of the Last Will and Testament of my grandmother, Emma W. Coulter, and not under any words, clauses or sentences expressed in the will of my mother, Rebecca C. Barclay."

No value in respect of any part of the principal of the trust established by decedent's mother was reported in decedent's Federal estate tax return. The Commissioner of Internal Revenue asserted a deficiency in estate tax based in large part on his determination that the value of one-fifth of the principal of such trust was includible in decedent's gross estate under Section 302(f) of the Revenue Act of 1926, as amended. The deficiency was paid, claim for refund filed and upon dis-

allowance of the claim as to the tax paid in respect of the value of one-fifth of the principal of the trust and other items decedent's executor brought suit in the District Court of the United States for the Western District of Pennsylvania.

Upon trial thereof a further overpayment was found with respect to items not here in controversy, but the District Court held that the tax paid as a result of the inclusion in decedent's gross estate of the value of one-fifth of the principal of the donor's trust had been properly assessed and collected on the grounds (a) that the decedent's interest in the trust fund was a fee and as such was required to be included in her gross estate under Section 302(a) of the Revenue Act of 1926, as amended, and (b) that one-fifth of the principal of the trust *passed* under a general power of appointment exercised by decedent by will, the appointee's, decedent's son's, renunciation being held a nullity, and hence was required to be included in her gross estate under Section 302(f) of the Revenue Act of 1926, as amended.

The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court, for reasons other than those relied upon by the District Court, holding (a) that while decedent's interest in the trust fund was not a fee, required by Section 302(a) of the 1926 Revenue Act, as amended, to be included in decedent's gross estate, there was a sufficient shifting of economic interests to come within the doctrine of *United States v. Jacobs,* 306 U.S. 363, and *Tyler v. United States,* 281 U.S. 497, and (b) that the decedent intended to and did appoint the appointive estate to her own estate rather than to her son and, hence, that there was a tax-

able passing of the appointive estate under the power under the doctrine of *Rogers v. Commissioner,* 320 U.S. 410.

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254 and 2101(c), the suit having been instituted under Section 41 (20) of the Judicial Code, 28 U.S.C. 41 (20), 43 Stat. 972, for recovery of an internal revenue tax alleged to have been illegally assessed and collected in an amount exceeding $10,000, the collector of internal revenue by whom such tax was collected being not in office as such collector at the time the suit was commenced.

The validity of subsections (a) and (f) of Section 302 of the Revenue Act of 1926, as amended, 48 Stat. 754 and 47 Stat. 279 (26 U.S.C.A., Int. Rev. Acts, 1924 to 1940, pp. 227, 230-1), as sanctioning the inclusion of the value of one-fifth of the principal of the trust created by the donor in decedent's gross estate is involved.

Such sections provide:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

"(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * * * *

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will; * ** **"

The judgment of the United States Court of Appeals for the Third Circuit was entered April 27, 1949, rehearing was denied June 18, 1949, and this petition was filed July 19, 1949.

That the questions involved are substantial is shown by the following:

The ruling of the Court of Appeals is an unwarranted extension of the doctrine of *United States v. Jacobs, supra,* and *Tyler v. United States, supra,* in that the doctrine of those cases is applied to render taxable the principal of a trust fund upon the death of a tenant for years when such tenant did not create the fund. In the *Jacobs* and *Tyler* cases, *supra,* there was involved the shifting of economic interests upon the death of tenants by the entireties who had established such tenancies. To sustain the judgment of the Court of Appeals, that decedent's interest in her mother's trust was a taxable interest under Section 302(a) of the Revenue Act of 1926, as amended, would create by judicial *fiat* rather than by legislative enactment, an entirely new field of taxable changes in ownership of property never heretofore held to be within the contemplation of any previous or existent estate tax statute. The power of Congress to impose a tax on a change in ownership of property whenever a tenancy therein for life or years, however created, ceases upon the death of such tenant, and is followed by a new tenancy in remainder or otherwise in another, is not here questioned. It may well be within the constitutional power of Congress so to legislate; but such power has not been yet exercised.

To sustain the alternative holding of the Court of Appeals that there was an exercise of the power of appointment in favor of decedent's own estate rather

than in favor of the person entitled to take in default of appointment, would authorize a complete disregard of an express ruling by the Supreme Court of Pennsylvania as to the scope of application of a Pennsylvania statute affecting testate and intestate succession and holding that such statute will not be construed so as to operate to convert an exercise of a power of appointment in favor of a named person into an exercise in favor of the donee's own estate when it appears that the donee's individual estate exceeds all debts, costs and other legacies.

Questions Presented.

1. Decedent's mother established a testamentary trust for a term of years under which she gave decedent and each of her other children, the right to share in the income and principal and general powers of appointment over their respective shares of the principal and income in the event of the death of any such child prior to termination, and made gifts over in default of appointment to each child's heirs at law. Is the interest of the decedent in the principal of such trust fund an interest in property required to be included in decedent's gross estate under Section 302(a) of the Revenue Act of 1926, as amended, the decedent's death having occured in 1937?

2. Decedent directed payment of her debts and certain legacies and bequeathed her residuary estate to her son, her sole heir at law, making no reference to the above-described appointive estate. Under Pennsylvania law, such residuary clause in her will operated as an exercise of her general power of appointment over one-fifth of the corpus of her mother's trust. Her son purported to renounce the transmission to him under de-

cedent's will of the one-fifth share of the principal of the trust. Did the statute effect an exercise of the power in favor of decedent's own estate or in favor of her son and sole heir at law, who would have taken in default of appointment, and is the value of such one-fifth share of the principal of the trust required to be included in decedent's gross estate under Section 302(f) of the Revenue Act of 1926, as amended?

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Court below is in conflict with applicable decisions of this Court (*Helvering v. Grinnell,* 294 U.S. 153, and *Roger's Estate v. Helvering,* 320 U.S. 410), which hold that the exercise of a general power which "merely echoes the limitations over on default of appointment" is not to be considered as an exercise of the power or as resulting in the passing of any property thereunder.

2. The decision of the Court below is in conflict with this Court's decision (*Helvering v. Safe Deposit & Trust Company of Baltimore,* 316 U.S. 56), which holds that the interest of a decedent in a trust established by another, such interest consisting of a right to the income, the remainder upon termination and a power of appointment by will over the trust property, there being a gift over on default of appointment, was not an interest the value of which is required to be included in decedent's gross estate under Section 302(a) of the Revenue Act of 1926, as amended, where such decedent died prior to 1942.

3. The decision of the Court below is in conflict with the decision of the Supreme Court of Pennsylvania (*Huddy's Estate,* 236 Pa. 276) that Section 11 of the

Pennsylvania Wills Act (Act of June 17, 1917, P.L. 403), which makes the will of a donee of an unrestricted absolute power operate as an exercise of such power, even though no such intention is expressed therein, is not to be construed as effecting an exercise of the power in favor of the donee's own estate where the donee's individual estate exceeds the aggregate of the donee's debts, estate expenses and legacies.

4. The decision of the Court below conflicts with its own decision (*Commissioner v. Estate of Cardeza*, 173 F. 2d 19), which follows the rule stated in the *Grinnell* and *Rogers* cases, *supra*, that an exercise of a power which merely echoes the gift over in default of appointment is not considered as an exercise of the power or as resulting in the passing of any property thereunder.

Respectfully submitted,

JOHN BARCLAY, JR.,
Executor of the Estate of Rebecca Coulter Barclay, Deceased,
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NO. 240

JOHN BARCLAY, JR., Executor of the Estate of Rebecca Coulter Barclay, Deceased, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

BRIEF IN SUPPORT OF PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

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BRIEF IN SUPPORT OF PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The opinions of the District Court of the United States for the Western District of Pennsylvania were filed October 6, 1947 and January 7, 1948, respectively, and are officially reported as 73 F. Supp. 816 and 74 F. Supp. 938. The opinion of the United States Court of Appeals for the Third Circuit was filed April 27, 1949, and rehearing was denied on June 18, 1949. The opinion has not yet been officially reported.

JURISDICTION.

The judgment, review of which is sought, is a final judgment of the United States Court of Appeals for the Third Circuit affirming a judgment of the District Court of the United States for the Western District of Pennsylvania. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Sections 1254 and 2101 (c), the suit having been instituted under Section 41 (20) of the Judicial Code, 28 U.S.C.A. 41 (20), 43 Stat. 972, for recovery of internal revenue tax alleged to have been illegally assessed and collected in an amount exceeding $10,000, the collector of internal revenue by whom such tax was collected being not in office as such collector at the time the suit was commenced.

STATEMENT OF THE CASE.

Rebecca Coulter Barclay died in 1937, a widow and resident of Pennsylvania. (R. 24a, 28a) In her will she directed payment of her debts, funeral expenses and probate expenses. She then made several specific bequests aggregating approximately $120,000. The next and last dispositive direction in her will was as follows: "All the rest, residue and remainder of my estate I will, devise and bequeath to my son, John Barclay." (R. 91a-93a) Decedent's individual estate, administered by her executor, exceeded the aggregate of her debts, administration expenses and specific legacies by more than $700,000. (Exh. 3; R. 11a)* Decedent was survived by

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* Exhibit 3 was not printed in the petitioner's Appendix in the Court below but was part of the record on appeal.

an only son, John Barclay, Jr., her sole heir at law. (R. 17a)

At the time of her death decedent was one of five beneficiaries of a testamentary trust created by her mother, Emma W. Coulter (donor), at her death in 1929. (R. 27a, 80a-91a)

Under the donor's will the income of such testamentary trust was payable in equal shares to her five children and upon termination of the trust the principal was also distributable to them in equal shares. (R. 85a, 86a) Each of her children was given general powers of appointment by will over each such child's share of the income and the principal of the trust and in default of appointment the income was payable and the principal distributable, upon termination of the trust, to the persons who would have been entitled to receive the same under the laws of Pennsylvania as though each such child had been legally seized and possessed of his or her share of the income and principal and had died intestate. (R. 85a, 86a)

The donor's will further provided that the trust should terminate upon the death of the survivor of the trustees and, in any event, upon the expiration of twenty-one years from the donor's death, but that the trust could be terminated before the end of such period of twenty-one years by the trustees. The trustees appointed were the decedent and her brother, Richard. The trust is still in existence. (R. 86a)

Under Pennsylvania law the above-quoted residuary clause of decedent's will operated as an exercise of the general power of appointment over a one-fifth share of the principal of her mother's testamentary trust. (R.

19a) As will later appear, an important issue in this case is whether such power was exercised in favor of decedent's son or in favor of her own estate.

On April 5, 1939, decedent's son filed a written renunciation in the proceedings in decedent's estate pending in the Orphans' Court of Westmoreland County, Pennsylvania, which, after various recitals not here material, read: "Therefore, I, John Barclay, Jr., do hereby elect to take whatever interest I may have in the trust established under the last Will and Testament of Emma W. Coulter, by, through, under and by virtue of the Last Will and Testament of my grandmother, Emma W. Coulter, and not under any words, clauses or sentences expressed in the will of my mother, Rebecca C. Barclay." (R. 28a, 94a-95a)

No value in respect of any part of the principal of the trust established by decedent's mother was reported in decedent's Federal estate tax return. The Commissioner of Internal Revenue asserted a deficiency in estate tax based in large part on his determination that the value of one-fifth of the principal of such trust was includible in decedent's gross estate under Section 302(f) of the Revenue Act of 1926, as amended. (R. 25a, 30a-43a) The deficiency was paid, claim for refund filed and upon disallowance of the claim as to the tax paid in respect of the value of one-fifth of the principal of the trust and other items decedent's executor brought suit in the District Court of the United States for the Western District of Pennsylvania. (R. 25a, 26a)

Upon trial thereof a further overpayment was found with respect to items not here in controversy (R. 107a), but the District Court held that the tax paid as a result

of the inclusion in decedent's gross estate of the value of one-fifth of the principal of the donor's trust had been properly assessed and collected on the grounds (a) that the decedent's interest in the trust fund was a fee and as such was required to be included in her gross estate under Section 302(a) of the Revenue Act of 1926, as amended, and (b) that one-fifth of the principal of the trust *passed* under a general power of appointment exercised by decedent by will, the appointee's, decedent's son's, renunciation being held a nullity, and hence was required to be included in her gross estate under Section 302(f) of the Revenue Act of 1926, as amended. (R. 95a-106a)

The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court, for reasons other than those relied upon by the District Court, holding (a) that while decedent's interest in the trust fund was not a fee, required by Section 302(a) of the 1926 Revenue Act, as amended, to be included in decedent's gross estate, there was a sufficient shifting of economic interests to come within the doctrine of *United States v. Jacobs,* 306 U.S. 363, and *Tyler v. United States,* 281 U.S. 497, and (b) that the decedent intended to and did appoint the appointive estate to her own estate rather than to her son and, hence, that there was a taxable passing of the appointive estate under the power under the doctrine of *Rogers v. Helvering,* 320 U.S. 410. (R. 1-8)

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the value of one-fifth of the principal of the trust created by decedent's mother was required to be included in decedent's gross estate by Section 302(a) of the Revenue Act of 1926, as amended.

2. In holding that decedent exercised her power of appointment in favor of her own estate rather than in favor of her son.

3. In holding that any property passed under decedent's exercise of her power of appointment over one-fifth of the principal of the trust created by decedent's mother, notwithstanding the election of decedent's son not to take any of the trust property under decendent's will.

4. In holding that the value of one-fifth of the principal of the trust created by decedent's mother was required to be included in decedent's gross estate under Section 302(f) of the Revenue Act of 1926, as amended, decedent having died in 1937.

ARGUMENT.

Relevant Statute.

The Court of Appeals held that subsections (a) and (f) of Section 302 of the Revenue Act of 1926, as amended, required the inclusion in decedent's gross estate of the value of one-fifth of the principal of the trust created by the decedent's mother. Such subsections provide:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> "(a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * * * *
>
> "(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will; * * *"

The Court Below Erred in Holding that One-Fifth of the Principal of the Trust Created By Decedent Was Required To Be Included in Decedent's Gross Estate Under Section 302(a) of the Revenue Act of 1926, as Amended.

Relying on Section 302(a) the Court of Appeals said that there was a sufficient shifting of economic interests at the death of decedent to bring the value of one-fifth of the corpus of the trust created by decedent's mother within the statute under the doctrine of *United*

States v. Jacobs, supra, and *Tyler v. United States, supra.* Those cases, we submit, are not authority for the holding of the court below since the essential element of self-created joint ownership existing in those cases is not present in the case at bar. In the *Tyler* case, *supra,* the application of Federal estate tax to the entire value of property held by spouses as tenants by entireties was sustained upon the deaths of those spouses whose properties or funds had been the sole originating sources of the tenancies, the surviving spouses having contributed nothing to the creation of the tenancies. In the *Jacobs* case, *supra,* the Federal estate tax was sustained as to the entire value of the property held by spouses as joint tenants with right of survivorship, nothwithstanding such tenancies were created before enactment of any Federal estate tax, it also appearing in the *Jacobs* case that the funds or property of the deceased spouses had been the sole originating source of the tenancies. Such cases are obviously not comparable to the case at bar where decedent did not create the trust and was never at any time the owner of the trust property.

The decision of this Court in *Helvering v. Safe Deposit & Trust Company,* 316 U. S. 56, is in direct conflict with the ruling of the court below. In the *Safe Deposit* case the testamentary trust created under the will of young Reynolds' father was indistinguishable from that created by decedent's mother, Mrs. Coulter. Under both trusts, there were estates for years, remainders upon termination, general testamentary powers of appointment and gifts over in default. This Court in an exhaustive review of the legislative history of Section 302(a) of the Revenue Act of 1926, as amended, held that the interest of the decedent in the *Safe Deposit* case

was not one intended by Congress to be included under Section 302(a). See also, *United States v. Field,* 255 U. S. 257, and *Burnett v. Guggenheim,* 288 U. S. 280.

While this Court did not consider whether the benefits during life which were provided under the trust for young Reynolds in the *Safe Deposit* case, terminating at his death, made the trust properties part of his gross estate under the statute, the result which obviously would have been reached is indicated by the regulations in force at the time of decedent's death: Regulations 80 (1937 Ed.) Article 13. Such Article 13 shows clearly that the lapse upon death of the benefits provided during life for a decedent does not make any part of the trust properties taxable as part of such decedent's gross estate. Such Article provides:

> "The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder in the case the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death * * *"

While the latest regulations (Regulations 105 (1949 Ed.), Article 81.3) omit the quoted language, it cannot be supposed that any change in the intent of Congress can be inferred from such omission. Neither Section 302(a) of the Revenue Act of 1926, as amended, nor Section 811 (a) of the Internal Revenue Code expressly refers to interests lapsing at death. The change in the language of the regulations as between Regulations 80 and Regulations 105 was intended to give effect to this Court's decision in *Helvering v. Hallock,* 309 U.S. 106, dealing with interests reserved in property initially owned by a decedent but transferred *inter vivos.*

The Court of Appeals Erred in Holding That Decedent Exercised Her Power of Appointment in Favor of Her Own Estate Rather Than in Favor of Her Son.

The Court of Appeals held that decedent exercised the power of appointment in favor of her own estate rather than in favor of her son, that the son's renunciation of his right to take the property under the power as exercised was a nullity because the appointment was not in his favor and that, as a result of the exercise of the power, the appointive estate passed as part of decedent's residuary estate. The keystone of the reasoning of the Court below is its holding that decedent exercised the power in favor of her own estate thereby effecting a blending of her individual estate with the appointive estate. The Court below relied for its conclusion upon four decisions of the Supreme Court of Pennsylvania: *In re Miller's Trust,* 313 Pa. 18, 169 A. 362; *In re Stannert's Estate,* 339 Pa. 449, 15 A. 2d 360; *In re Jackson's Estate,* 337 Pa. 561, 12 A. 2d 338 and *In re Pennsylvania Company for Insurances on Lives, etc.,* 264 Pa. 443, 107 A. 840. Those cases are authority only for the proposition that where the aggregate of decedent's debts and legacies exceeds the decedent's individual estate the execution of a power of appointment by the residuary clause of the decedent's will will be held to effect an appointment in favor of decedent's estate with a consequent blending of the individual and appointive estates. In the case at bar, however, the decedent's estate exceeded the aggregate of her debts and specific legacies by more than $700,000 so that the situation here presented is quite different from the conditions existent in the cases relied upon by the Court of Appeals. (R. 11a, Exh. 3). Further, the effect of an exercise of a power of appointment

by the residuary clause of decedent's will where the individual estate exceeded the aggregate of debts and legacies has been ruled on by the Pennsylvania Supreme Court in *Huddy's Estate,* 236 Pa. 276, 84 A. 909. In that case decedent having a general power of appointment over a trust created by her mother made specific bequests and then by the residuary clause of her will gave one-half of her residuary estate to her sisters and brother and the other one-half to her husband, in trust so long as he should remain unmarried, with remainders over to her sisters in event of the husband's remarriage or death. The husband elected to take against his wife's will. The auditing judge awarded the trust fund to the executors of the decedent's estate, holding that there had been a blending of the appointive and individual estates. The Pennsylvania Supreme Court reversed, holding that the trust fund passed to the persons named as residuary legatees rather than to the decedent's executors, that the husband as one of such appointees was entitled to share in the trust fund and that his election to take against the will applied only with respect to decedent's individual residuary estate. The Supreme Court held that Section 3 of the Act of June 4, 1879, P. L. 88, which was re-enacted *verbatim* as Section 11 of the Wills Act, Act of June 17, 1917, P. L. 403, 20 P.S. 223 (App. 23) which latter statute, being in force throughout the year 1937, the year of decedent's death, was determinative of the effect of decedent's will, had the effect of making the will of a donee of an unrestricted absolute power operate as an exercise of the power even though no such intention was expressed in the will, and said (236 Pa. P. 282):

> *"The law now assumes that such was the intent of the testator unless a contrary intent appears by the will: Aubert's Appeal, 109 Pa. 447. Since there are sufficient funds in the estate of the donee to pay her pecuniary legacies in full there is no necessity for applying the Act of 1879 so as to throw them upon the trust fund and the law will not assume that the donee of the power intended so to exercise it; therefore, those to whom she left pecuniary and specific legacies have no interest in this fund nor under the facts of this case have the donee's creditors."*

It may be argued that the decedent's testamentary direction, in the case at bar, that her debts be paid distinguishes this case from *Huddy's Estate, supra,* where there was no direction to pay debts. We submit that there is no evidentiary distinction between a direction to pay debts and a direction that specific legacies be paid. When a testator makes specific bequests he thereby carves out of his estate a fund to be paid absolutely before the amount of any residuary estate can be determined. The law, whether or not a testator's will contains a provision for payment of his debts, carves out of the testator's estate a similar fund which must be paid absolutely before the amount of the testator's residuary estate can be determined and, for that matter, the amount of the specific legacies which can be paid. Consequently, the fact that a testator directs payment of his debts is no stronger evidence of intention to blend a testator's individual and appointive estates than is a direction to pay specific legacies. *Huddy's Estate, supra,* holds that where the individual estate is sufficient in amount to pay specific legacies which, of course, can be paid only after all debts have been satisfied, no inference may be drawn that the decedent intended a blending of

the appointive and individual estates from the fact that specific legacies were made. We submit that the holding would have been no different if the testatrix in *Huddy's Estate* had directed that her debts also be paid. In the case at bar we submit that the direction to pay debts and specific legacies is no stronger support, than a mere direction to pay specific legacies, for the inference of intention to blend since, in the case at bar, the decedent's individual estate was far in excess of the aggregate of her debts and specific legacies. The Court below erred in failing to follow the doctrine established by the Pennsylvania Supreme Court that Section 11 of the Pennsylvania Wills Act will not be construed as effecting a blending where the decedent's individual estate is amply sufficient to pay all debts and specific legacies.

The Court Below Erred in Holding That Any Property Passed Under Decedent's Exercise of Her Power of Appointment Over One-Fifth of the Principal of the Trust Created by Her Mother, Notwithstanding the Election of Decedent's Son Not to Take Any of the Trust Property Under Decedent's Will.

The Court below completely disregarded the rulings of this Court in *Helvering v. Grinnell,* 294 U. S. 153, and *Helvering v. Safe Deposit Company of Baltimore, supra.* In the *Safe Deposit* case this Court restated the principle which it had applied in *Helvering v. Grinnell* as follows (316 U.S., at p. 65):

> "The respondents contend that the principle of the Lyeth case, announced by the Court with respect to income tax liability, should not be controlling where, as here, the question is one of estate tax

liability. It is urged that taxes should not be influenced by what occurs after the taxable event; that it is reasonable to consider a compromise *preceding* the receipt of income in connection with an income tax; but that a compromise occurring *after* the decedent's death, which is the 'taxable event' under an estate tax, should not be considered. Whatever may be the general rule in this respect, this Court has clearly recognized, in Helvering v. Grinnell, 294 U. S. 153, 55 S. Ct. 354, 79 L. Ed. 825, that events subsequent to the decedent's death, events controlled by his beneficiaries, can determine the inclusion or not of certain assets within the decedent's gross estate under Section 302(f). In that case the decedent had exercised a general testamentary power of appointment, an act which under Section 302(f) brings the property subject to the power within the gross estate. The subsequent renouncement by the appointees of the right to receive by appointment and their election to take as remaindermen in default of appointment were held by this Court to place the property subject to the power outside the scope of Section 302(f)."

Nothing in *Estate of Rogers v. Helvering,* 320 U.S. 410, detracts from the principle of the *Grinnell* case, *supra,* and the correctness of the *Grinnell* case was expressly upheld in the *Rogers* case.

The action of the Court below was based solely upon its conclusion that the decedent's appointment was in favor of her estate rather than in favor of her son, who, under the donor's will, was the person entitled to take in default of appointment. Not only was the conclusion of the Court of Appeals as to the manner of exercise of the

power of appointment incorrect, being in conflict with the established rule of the Supreme Court of Pennsylvania to the contrary, but its conclusion as to the validity and effect of the renunciation and election by decedent's son was also in error.

That both the District Court and the Court of Appeals were wrong in holding that the election by decedent's son was a nullity is so clear as to require but brief analysis. The District Court seemed to regard it as a matter of established Pennsylvania law that a donee, legatee or appointee may not refuse to receive a gift, legacy or appointment. That the Pennsylvania law is otherwise requires reference only to the decision of the same Court of Appeals in *Commissioner v. Estate of Charlotte D. M. Cardeza, etc.*, 173 F. 2d 19, in which the action of the Orphans' Court of Philadelphia County, Pennsylvania, in sustaining the validity of a renunciation of a testamentary appointment was noted. The Court of Appeals, however, while conceding that a renunciation may validly be made, seemed to go, without anything else, on the theory that the renunciation here involved was merely a renunciation of the appointment alone and not of anything else. A mere reading of the renunciation will show how incorrect and unrealistic was the reasoning of the Court of Appeals. The language in which decedent's son renounced his rights with respect to the appointive estate under decedent's will is broad and explicit:

> "I * * * do hereby elect to take whatever interest I may have in the trust established under the Last Will and Testament of Emma W. Coulter by, through, under and by virtue of the Last Will and Testament of my grandmother * * * and not

> under any words, clauses or sentences expressed in the will of my mother. * * *" (R. 94a-95a).

There could scarcely be any clearer expression of his intention to renounce every interest in the trust property that might come to him under his mother's will. The Pennsylvania law is clear that if his renunciation was such as to renounce the property whether as a part of his mother's residuary estate or under a power of appointment exercised by her in his favor, the property then reached him as a result of his grandmother's will because there was a default of appointment so far as his mother was concerned. In such case Pennsylvania law holds that the taker in default receives the property directly from the donor and not as a result of anything done by the donee.

The above principles were expressly recognized in *Commissioner v. Estate of Cardeza, supra.* In that case it appeared that the donor created a trust leaving the income of two-thirds thereof to his daughter, Charlotte, for life and the balance to Charlotte's son, Thomas. Charlotte was given a general testamentary power of appointment over two-thirds of the principal of the trust and there was a gift over if she died "without having executed the power of disposition" to the grandchildren of the donor until such time as Thomas should die, at which time the two-thirds share was to be divided per stirpes among the donor's grandchildren and the issue of the donor's deceased children and grandchildren. Charlotte died after the death of the donor leaving a will in which she expressly purported to exercise her power of appointment over two-thirds of the principal of the trust in favor of Thomas. After Charlotte's death

Thomas filed a renunciation in writing, renouncing "the benefits I may receive under the exercise of the said power by my mother in her Last Will", but reserving all other benefits to which he was entitled under the donor's will and Charlotte's will. At audit before the Orphans' Court of Philadelphia County, Pennsylvania, the auditing judge awarded the principal of the donor's trust to the trustees appointed by the donor directing that the principal "be retained * * * for the uses and purposes of the trust." Thomas, being the only surviving grandchild of the donor, was entitled under the donor's will to all of the income of the trust, one-third of which he had been receiving during his lifetime by direct gift under the donor's will and two-thirds on the theory that he took in default of appointment as the only living grandchild of the donor. A majority of the Court below in that case held that the renunciation was effective and the result which followed under Pennsylvania law was just the same as though the donee of the power had not even purported to exercise the power. It is impossible, we submit, to hold that under the language of the will in the Cardeza case Charlotte failed to execute her power and in practically the same breath say that under the language of the will of decedent's mother there was no default when the legatee *fully renounced any interest whatsoever under his mother's will.* In the instant case the will of decedent's mother merely directed a limitation over "in default of such appointment". Such language is even more susceptible of the construction applied by the Court below in the *Cardeza* case because in the donor's will in the *Cardeza* case the language was "without having executed the power of disposition".

That the Court below in the *Cardeza* case clearly understood the problem presented in both cases is shown by the careful analysis set forth in the majority opinion (173 F. 2d 27):

> "The narrow question confronting us is accurately posed by an illustrative hypothetical case: T, a testator, makes a will in which he gives a life estate to A with a testamentary power of appointment in A. He accompanies this grant, in the same document, with a gift over in default of appointment. T dies. Then A dies leaving a will in which he exercises the power by appointing B. B, however, renounces. What happens to the property which is the subject matter of the power?"

The majority opinion went on to recite that the law in Pennsylvania is, as stated above, that where the power is not effectively exercised, whether due to the fault of the donee or renunciation of the appointee, the property passes to the person or persons named to take in default of exercise.

No matter how the case at bar be viewed a hypothetical statement of its facts is virtually identical with that of the majority of the Court below in the *Cardeza* case and may be put this way: T, a testator, makes a will in which he gives an estate for years to A with a testamentary power of appointment in A. He accompanies this grant in the same document with a gift over in default of appointment to B. T dies. Then A dies leaving a will in which she exercises the power by appointing either to B or to A's own estate of which B is the sole residuary legatee. B renounces all interest whatsoever in the appointive estate under A's will. What

happens to the property which is the subject matter of the power?

If it be assumed that the appointment was to B, as we contend is the fact under Pennsylvania law, there is a default and the property passes to B under the donor's will. If it is held that the appointment is to the donee's own estate, then, the legatee of such part of the estate having renounced, there is also a default of appointment and the legatee in default also takes under the donor's will. The donee has by appointment to her own estate made an appointment which has been effectively renounced by her residuary legatee who has elected that he would not take any part of the trust property "under any words, clauses or sentences expressed in the will of my mother".

We submit that the Court below was clearly wrong not only in its obvious disregard of the language of decedent's son's renunciation, but in its disregard of the Pennsylvania rule that if the exercise of the appointment be defeated the legatee in default takes under the will of the donor and nothing passes under the power or as a result of the attempted exercise of the power by the donee.

The Court of Appeals Erred in Holding That the Value of One-Fifth of the Principal of the Trust Created by Decedent's Mother Is Required to Be Included in Decedent's Gross Estate Under Section 302(f) of the Revenue Act of 1926, as Amended, Decedent Having Died in 1937.

The Court of Appeals, in holding that Section 302(f) applied, reasoned that the appointment, being as it supposed in favor of decedent's own estate, made the trust property a part of decedent's residuary estate subject to debts and legacies and this being so, that the quantum of the appointive estate passing to the taker in default was different than it would have been if it had passed under the power, thus seeking to come within the rule of *Estate of Rogers v. Helvering, supra.* We submit that the quantum of the appointive estate, even though it might have passed as the Court of Appeals held (although it could not because donee's son renounced all interest in the trust arising out of the words of his mother's will), was unchanged and therefore that the rule of the *Grinnell* case, *supra,* expressly approved in the *Rogers* case, that a mere echoing of the limitation over in default of appointment is not sufficient to come within the scope of Section 302(f) of the Revenue Act of 1926, as amended, should be applied. The rule is stated thusly in *Restatement of the Law, Property,* Vol. 3, Sec. 363(2)(b):

"Where a general power of appointment is exercised by the residuary clause of the donee's will, the appointive property is allocated:

* * * * * * *

"(b) Ratably to the various dispositions of the residuary clause to whatever extent a different allocation would not increase the total effectiveness of the dispositions of the will."

Thus even if the Court of Appeals had been right in its conclusion that the appointive estate passed as part of the decedent's residuary estate, its quantum was not altered one iota.

Huddy's Estate, supra, is a clear illustration of the quoted rule. There the individual estate, being sufficient to take care of all debts and legacies, the appointive estate was divided among the persons named as residuary legatees in the will, the residuary clause being treated as an exercise of the power, such persons taking as appointees and not as residuary legatees. It should be noted that the effect given in *Huddy's Estate* to the surviving husband's election has now been changed by statute in Pennsylvania: Act of April 24, 1947, P. L. 89, sec. 8(c). We submit that precisely the same treatment would be accorded the appointive estate in the case at bar if it had been litigated in a Pennsylvania court prior to 1947. Inasmuch as decedent's individual estate so greatly exceeded the aggregate of her debts and specific legacies, no allocation of the appointive estate to payment of debts or legacies could increase to any extent the total effectiveness of the dispositions of the will. All of the appointive estate would, therefore, pass to decedent's son, the taker in default without increase or diminution. There would be transmitted and he would receive precisely what he was entitled to receive under the will of his grandmother. *Rogers Estate* renders the appointive estate taxable only where the donee by impos-

ing her own will upon the appointive estate has succeeded in altering in some measure the quantum thereof.

Clearly, therefore, since decedent's exercise of her power of appointment had no effect whatever upon the appointive estate, it cannot be said that she did anything other than to echo the limitation over in default of appointment and that, under the rule of the *Grinnell* case, is not to be treated as an exercise of the power or as effecting the passage of any property under the power where the legatee in default has renounced.

Respectfully submitted,

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APPENDIX.

Section 11, Pennsylvania Wills Act (Act of June 7, 1917, P.L. 403, sec. 11; 20 Purdon's Pennsylvania Statutes Annotated, sec. 223):

"General devise or bequest construed as exercise of power

A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will. In like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will."